CHONG KIM SANG

v.

METATRADE SDN BHD

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
MOHD NOOR AHMAD JCA
MOHD GHAZALI YUSOFF JCA
[CIVIL APPEAL NO: W-02-457-1996]
10 APRIL 2004

LABOUR LAW: *Employment - Workman - Whether claimant a workman - Contract of service - Claimant appointed executive director of company - Whether still an employee and a workman - Whether company paid claimant salary and contributed to his provident fund - Whether Industrial Court wrong to conclude that claimant was not a workman - Whether High Court wrong to refuse claimant's application for certiorari and mandamus - Whether Industrial Court seised with jurisdiction to hear claimant's representations - Whether Industrial Court's threshold jurisdiction may be challenged by way of a preliminary objection*

Upon a preliminary objection raised by the company/employer before the Industrial Court, the learned chairman held that the claimant/employee was an 'executive director' (and the very brain and directing mind) of the company and could not, therefore, have been a 'workman' within the definition of ss. 20 and 2 of the Industrial Relations Act 1967 ('the IRA'). Accordingly, the learned chairman then decided that the Industrial Court would have no jurisdiction to hear and determine the claimant's representations that his dismissal by the company was without just cause or excuse. Aggrieved, the claimant moved the High Court for orders of certiorari to quash the said decision/award of the Industrial Court and mandamus to direct the Industrial Court to hear his representations on their merits. The learned judge, however, refused to interfere with the said award, holding that the learned chairman had applied the correct test (as propounded by the Federal Court in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor*) in determining whether the claimant was indeed a workman. The claimant appealed to the Court of Appeal.

Held (allowing the appeal)
Per Mohd Ghazali Yusoff JCA delivering the judgment of the court:

[1] A workman – under the IRA – is one who is engaged under a contract of service; an independent contractor who is engaged under a contract for services is not a workman. That is the test propounded by the Federal Court in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* following the decision of the former Federal Court in *Dr A Dutt v. Assunta Hospital*. (pp 451 c-h & 452 a, h)

[2] Contrary to the learned judge's deduction, there was nothing in the award of the Industrial Court which indicated that the learned chairman had applied the *Hoh Kiang Ngan* test in determining whether or not the claimant was a workman. (p 453 a)

[3] It was not in dispute that the claimant received monthly wages/salary under his contract of service/employment with the company, and that the company had also contributed to his Provident Fund all along. An employee of a company may well be appointed as a director of that company; nonetheless, he remains an employee of the company so long as his contract of service is not terminated and he continues to be paid his wages. (pp 453 f-h & 454 a)

[4] It should have been clear to the learned chairman – from the terms of the claimant's contract of service with the company as well as from the company's board resolutions – that the claimant was a workman. He was still an employee of the company despite his appointment as the executive director of the company. That the claimant had attended directors' meetings, signed board resolutions, been made a signatory respecting the company's cheques and banking documents and represented the company at public functions did not change the fact that he was an employee and a workman. The Industrial Court was wrong to have concluded that they did. (pp 454 f-h & 455 a-c)

[5] If the learned judge had properly directed his mind to the decision-making process by which the learned chairman came to the conclusion that the claimant was not a workman, he would not have refused the claimant's application for the prerogative writs. This was a case in which substantial injustice had ensued. (pp 456 d-h & 457 d)

[6] The company's preliminary objection before the Industrial Court should not have been countenanced. The threshold jurisdiction of the Industrial Court may only be questioned by challenging the Minister's reference. The threshold jurisdiction of the Industrial Court cannot be challenged without

joining the Minister and seeking relief against him. Where a challenge is not thus taken, the Industrial Court must be permitted to decide the dispute to conclusion. On no account ought such matters to be taken or dealt with as preliminary objections. (pp 455 d-h & 456 a-c)

[Judgment of High Court overturned; certiorari and mandamus issued.]

Case(s) referred to:

Attorney-General, Malaysia v. Chemical Workers' Union of Malaya & Anor [1971] 1 MLJ 38 ***(refd)***

Chief Constable of the North Wales Police v. Evans [1982] 3 All ER 141 ***(refd)***

Dr A Dutt v. Assunta Hospital [1981] 1 MLJ 304 ***(foll)***

Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 FC ***(foll)***

Inchcape Malaysia Holdings Bhd v. RB Gray & Anor [1985] 2 CLJ 305; [1985] CLJ (Rep) 132 ***(not foll)***

Kathiravelu Ganesan v. Kojasa Holdings Sdn Bhd [1997] 3 CLJ 777 SC ***(foll)***

Kesatuan Pekerja-pekerja Kenderaan Sri Jaya v. The Industrial Court & Ors [1970] 1 MLJ 78 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 30(1)
Employees Provident Fund Act 1991, ss. 2, 43(1)
Industrial Relations Act 1967, ss. 2, 20(3), 33A

For the appellant/claimant - LG Seah; M/s Lobo & Assoc
For the respondent/company - KA Gan; M/s Lee Hishammuddin

[Appeal from High Court, Kuala Lumpur; Originating Motions No: R1-25-167-1995]

Reported by Gan Peng Chiang

JUDGMENT

Mohd Ghazali Yusoff JCA:

This was an appeal against the decision of the learned judge, High Court, Kuala Lumpur who dismissed the appellant's application for an order of *certiorari* to quash the award of the Industrial Court and for an order of mandamus to direct the Industrial Court to hear his dismissal case on the merits.

The appellant, who claimed that he was an employee of Metatrade Sendirian Berhad, the respondent, and which according to the evidence is a subsidiary company of Metacorp Berhad, considered that he had been dismissed without just cause or excuse by the respondent and consequently made representations to the Director General for Industrial Relations. The representations were subsequently referred to the Industrial Court by the Minister for an award pursuant to s. 20(3) of the Industrial Relations Act 1967 ("the Act").

In his "statement of case" before the Industrial Court, the appellant stated that at the material time he was the executive director and general manager of the respondent and his last drawn salary was RM5,000 per month. It is his claim that as an employee he was entitled to the following:

(a) a basic salary;

(b) a fully maintained company motor-car;

(c) housing interest subsidy;

(d) household utilities, *viz*., his telephone, water and electricity bills were paid by the respondent;

(e) 13% of basic salary for Employment Provident Fund;

(f) annual overseas trip with his family; and

(g) corporate membership to two golf clubs.

He also stated therein that he had enjoyed receiving a 5-months bonus for the last three financial years. By letter dated 17 February 1993 the respondent summarily dismissed him with effect from the date of the letter. He contended that:

(i) the said dismissal was without any or any just cause or excuse; and

(ii) that the said dismissal was contrary to the principles of natural justice, equity, good conscience and an unfair labour practice which ought to be struck down as such by the court.

As such he prayed for reinstatement to his former position without loss of any benefits monetary or otherwise whatsoever.

When the matter was set down for hearing on 18 October 1995 before the Chairman, Industrial Court, the respondent raised a preliminary objection, namely, that the appellant was not a "workman" within the meaning of s. 2 of the Act and as such the Industrial Court had no jurisdiction to hear and determine the reference to it by the Minister. In order to determine whether the appellant was or was not a workman, the Chairman heard oral evidence and perused documents submitted to him. On 27 October 1995, he came to the conclusion that the appellant was not a workman within the meaning of s. 2 of the Act and "therefore the Industrial Court has no jurisdiction to hear and determine the reference made to it by the Minister under s. 20(3) of the Act".

The appellant, upon obtaining leave, moved the High Court for an order of *certiorari* to quash the award of the Industrial Court and for an order of mandamus to direct the Industrial Court to hear his dismissal case on the merits. On 25 July 1996 the learned Judge dismissed the appellant's application with costs.

As discussed earlier, in dealing with the respondent's preliminary objection, the Chairman, Industrial Court proceeded to hear oral evidence. He first heard witnesses for the respondent. The first witness, Noor bin Noordin, the Chairman and Managing director of Metacorp Berhad, *viz.*, the holding company of the respondent, testified that the appellant was running the respondent and had the power to recruit and terminate staff. He also stated as follows:

> I disagree Claimant was the GM but employee of Company. He was the Executive Director of the group and Company and was also an employee. He was employee of Company as Executive Director until he was dismissed.
>
> Claimant joined Metakem as a Chemist. He later became Factory Manager of Metakem. Later when Metatrade was formed the commercial trade in Metakem was moved to Metatrade. He was then made General Manager. Later he was promoted as Executive Director of Group Company (including Metatrade). When he became Executive Director he was no longer as General Manager or Chemist.

The second witness for the respondent, Teoh Saw Sin, a former accountant of the respondent and the Metacorp group of companies stated that "for day to day administration I refer to the claimant as Director of the Company". She also stated the following:

(a) that the respondent is a trading company and "the claimant would make the final decision in respect of commercial matters";

(b) that generally, for policy matters, the appellant would report to the said Noor bin Noordin;

(c) that part of the appellant's responsibility was to recruit staff.

The appellant testified that he was an employee as well as director of the respondent. As executive director he was still responsible to the managing director and was required to report to the same.

The evidence adduced before the Industrial Court showed, *inter alia*, the following:

(1) The appellant was appointed as executive director of the respondent with effect from 8 October 1989. The resolution of the respondent's board of directors, dated 7 October 1989, relating to the same reads:

METATRADE SDN BHD

(Incorporated in Malaysia)

DIRECTORS CIRCULAR RESOLUTION

WE, the undersigned Directors pursuant to approval granted on the 6th October 1989 hereby RESOLVE:

THAT Mr Chong Kim Sang of NRIC No 8160989 be and is hereby appointed Executive Director of the Company with effect from 8th October 1989 subject to the following terms and conditions which may be mutually agreed upon from time to time.

Mr Chong Kim Sang shall:

1. receive a monthly remuneration of M$3500 per month effective 1st November 1989 and there will be a review of his overall performance on 1st February 1990. Should his overall performance meet the expectation of the Board of Directors his salary shall be adjusted to M$5,000 per month retrospective 1st November 1989.
2. be entitled to annual increments to his remuneration.
3. report to and be responsible to the Managing Director.
4. devote substantially the whole of his time and attention during the business hours to discharge of his duties hereunder.
5. be responsible for the overall production, marketing, administrative, finance and accounting functions of the META GROUP OF COMPANIES and other duties and responsibilities assigned by the Managing Director from time to time.
6. be entitled to a Company Car to be registered in his name but which he holds in trust for the Company for use during his employment with the Company. Should he cease to be in the employment of the Company he will undertake to return and transfer the said vehicle to the Company.
7. be entitled to all the fringe benefits presently available by the Company to its executive staff.
8. be entitled to 28 days holiday exclusive of statutory holidays in each year to be taken at such times as the board shall consider most convenient having regard to the requirements of the company's business.

9. Not, while holding such office, be personally interested in any business, employment of other business connections, whether directly or indirectly with other companies, firms or organisations having similar business objectives as that of this Company.

10. The Company's terms and conditions relating to termination of employment and resignation shall apply.

THAT this appointment shall be subject to revision of the aforesaid terms and conditions and/or additional terms and conditions which the Company may deem fit to incorporate from time to time.

(2) An extract from the minutes of the annual general meeting of the respondent held on 16 March 1991 reads as follows:

RESOLVED:
Housing Loan Interest Subsidy to Director

THAT approval be and is hereby given to subsidise Mr Chong Kim Sang who is a director and employee of the Company in respect of the interest payable for a Housing Loan not exceeding $400,000 for any interest over and above 4% of the interest chargeable/ charged by the bank/financial institution.

(3) A directors' circular resolution dated 28 March 1991 authorising the purchase of a motor vehicle by the respondent reads, *inter alia*, as follows:

3. Declaration of Trust

THAT Mr Chong Kim Sang NRIC NO: 8160989 undertakes to hold the said vehicle in trust for the Company and to transfer the said vehicle to the Company should he cease employment with the Company.

(4) The minutes of the respondent's board of directors meeting held on 15 March 1993 showed that the board recommended a sum totalling RM8,000 be paid to directors as directors' fees for the financial year ended 31 December 1992 subject to the approval of the shareholders at the forthcoming annual general meeting of the respondent. It was recommended that RM500 be paid to the appellant.

(5) The appellant was also appointed as director in the following subsidiary companies of Metacorp Bhd, namely:

(a) Metaurus Sdn Bhd with effect from 1 November 1989;

(b) Metazinc Sdn Bhd with effect from 23 November 1989;and

(c) Metakem Bhd with effect from 23 May 1990.

(6) In a prospectus dated 4 November 1991 issued by Metacorp Berhad, a paragraph entitled "Directors, Management and Employees", *inter alia*, reads as follows:

> Mr Chong Kim Sang, aged 36, is the Executive Director of Metacorp, Metakem, Metatrade and Metaurus. He joined the Company on 8 October 1979. He is currently the General Manager of Metatrade, a post he has held since he started working for Metatrade on 1 July 1986. Prior to joining Metatrade, he was the Assistant Manager of UMW Lysaght Sdn Bhd (April 1980 to October 1981) and United Lysaght Sdn Bhd (October 1979 to April 1980).

In his award, the Chairman, Industrial Court noted the following:

(a) that although the appellant was said to be the general manager of the respondent he was also made the executive director of the respondent and other subsidiaries and "as such the designation of General Manager is only a nomenclature and was not the true administrative function of the claimant in the company"; he then made reference to the following passages found in the judgment of Salleh Abas, LP in *Inchcape Malaysia Holdings Bhd v R.B. Gray & Anor* [1985] 2 CLJ 305; [1985] CLJ (Rep) 132:

> A director occupies a special position in the company and has different type of responsibilities from those of an ordinary employee of the company. By specifying in the contract that the respondent was employed as a director the parties to the contract must have intended that the respondent was not to be regarded as a workman. On this ground alone I could hold that the ruling by the Industrial Court was erroneous.
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> The letter of offer of employment and acceptance as well as the contract of employment clearly state that the respondent was employed as a director. Pursuant to this employment, the appellant took the necessary measures to have the respondent appointed as an executive director of IAD and a number of other companies within the appellant's group. As a director, the respondent on behalf of the companies of which he was a director, recruited employees of the companies and even terminated their services. With regard to the relationship between the appellant and their employees the respondent acted in the capacity of an employer and signed collective agreements on behalf of the appellant. Under the law as a director the respondent is the very brain of the companies or their directing mind determining and formulating the companies' policy. Thus, I cannot see how under the circumstances of this case, the respondent could be held to be a workman. I hold the ruling of the Industrial Court on this issue is clearly erroneous.

(b) the claimant attended the respondent's board of directors meetings and also the board meetings of other companies within the Metacorp group of companies, "had participated in the meetings and had given his views on commercial arms and aspects at the meeting"; "the resolutions of the Board of Directors were signed by the claimant as one of its Executive Directors";

(c) as the executive director, the appellant received benefits from the respondent which were not received by other employees;

(d) the appellant had represented the respondent at public functions;

(e) the appellant as the executive director of the respondent was one of the signatories of the respondent's cheques and banking documents.

Premised upon the above observations and also upon the testimony of the said Noor bin Nordin and Teoh Saw Sin who said that the appellant employed and terminated employees and "which were not seriously challenged", the chairman of the Industrial Court was of the view that "all these clearly show that the claimant was the very brain and directing mind of the company" and that it is "the decision of this court that the claimant as the Executive Director of Metatrade was the directing mind and will of the company and cannot said to be a workman". He then concluded as follows:

> From the totality of the evidence adduced it is the decision of this Court that the Claimant is not a workman within the meaning of Section 2, Industrial Relations Act 1967 and therefore the Industrial Court has no jurisdiction to hear and determine the reference to it by the Minister under Section 20(3) of the Act.

In his judgment the learned judge of the High Court said he was of the view that there was only one issue before him, namely, whether the Industrial Court had used the correct test propounded by the Federal Court in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687 when it ruled that the appellant was not a "workman" within the meaning of s. 2 of the Act. He was of the view that although the Industrial Court had based its award solely on *Inchcape*, he was satisfied that it had actually applied the test in *Hoh Kiang Ngan* in deciding whether or not the appellant was a "workman" under the Act. He then went on to say that he had perused the decision-making process pursued by the Industrial Court and was satisfied that it had taken into account the relevant evidence and disregarded the irrelevant evidence and that the conclusion arrived at by the Industrial Court was reasonable based upon the evidence before it.

Section 2 of the Act provides a "workman" means "any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute." Section 2 also provides a "contract of employment" means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as a workman and that other agrees to serve his employer as a workman;".

In *Inchcape*, which was relied on solely by the Chairman in making his award in the instant case, the respondent was employed by the appellant as director of two of its subsidiary companies. Subsequently his appointment was terminated and he was given six months salary *in lieu* of notice. The respondent referred the matter to the Director-General of Industrial Relations requesting that officer to take action under s. 20 of the Act with a view to his reinstatement on the ground that he being a workman was dismissed without just cause or excuse. The complaint was eventually referred by the Minister to the Industrial Court. A preliminary issue was raised at the outset of the proceeding before the Industrial Court in that the respondent, being employed as a director, was not a workman within the meaning of the Act. The objection was overruled by the Industrial Court whereupon the appellant applied to the court to have the question referred to the High Court under s. 33A of the Act. The Industrial Court refused the application. The appellant then applied to the High Court for leave to commence proceedings for an order of prohibition and *certiorari* and leave was granted. The High Court subsequently refused the appellant's application. The appellant appealed to the then Supreme Court. The appeal was confined to the learned judge's decision on his refusal to issue an order of prohibition only, the appellant having accepted the learned judge's decision on certiorari in that it could not lie because the application was made outside the time limit, ie, more than six months after the Industrial Court made its first ruling on 16 August 1981. The appeal was allowed and an order made prohibiting the Industrial Court from proceeding with the hearing of the respondent's claim.

In his judgment, Salleh Abbas LP said there were two issues in the appeal, namely:

(a) whether the respondent was a workman within the meaning of the Act; and

(b) whether an erroneous decision of the Industrial Court on that issue is an error which affects the jurisdiction of the Industrial Court.

In relation to the first issue, the Supreme Court, *inter alia*, held:

(i) the definition of a "contract of employment" in the Act requires that to be a workman a person must be employed as a workman and if he is employed in any other capacity he cannot be a workman;

(ii) the respondent was employed as a director and the parties to the contract must have intended that he was not to be regarded as a workman; on this ground the ruling by the Industrial Court was wrong;

(iii) under the law as a director the respondent is the very brain of the companies or their directing mind determining and formulating the companies' policy; in the circumstances of the case the respondent could not be held to be a workman and therefore the ruling of the Industrial Court on this issue is clearly erroneous.

In relation to the second issue the Supreme Court held:

(i) it is not absolutely correct in law to say that once the Minister had referred a dispute to the Industrial Court and the Industrial Court is seized with the jurisdiction, it can do nothing else but to hear the dispute;

(ii) the reference by the Minister does not clothe the Industrial Court with jurisdiction; it is only a procedure of bringing the dispute for adjudication before the Industrial Court but it is still open to the Industrial Court to see whether it has jurisdiction or not to deal with the matter if the issue is raised;

(iii) the error made by the Industrial Court in this case to the effect that the respondent is a workman was an error which is just not an error on the face of the record but an error which affects jurisdiction.

In his judgment, on the first issue, Salleh Abas LP said:

> There can be no doubt that the relationship between the appellant and the respondent by virtue of the contract of employment dated June 25, 1977 was that they were master and servant, or employer and employee. But this fact is neither here nor there, because the important criterion is the capacity or purpose for which the respondent was employed. The contract of employment in this case says that the respondent was employed as a director. Surely, common sense tells me that a director and a workman are poles apart and not synonymous.

In his judgment, on the second issue, Salleh Abbas LP said:

> I do not think that it is absolutely correct in law to say that once the Minister has referred a dispute, and the reference has not been impugned, the Industrial Court is seized with the jurisdiction and can do nothing else but to hear the dispute. Such a wide statement is apt to be misleading and cause confusion. Being seized with jurisdiction does mean that in every case the Industrial Court cannot determine whether it has a jurisdiction or not, nor decline to proceed further in the event that it has no jurisdiction. The Industrial Court has of course to look at the reference and despite the fact that the order of the Minister still stands, it has the power to decide whether the dispute referred to it was a trade dispute or not, or whether the aggrieved employee was a workman or not, for only workman could become a party to a trade dispute. These are two vital questions which affect the jurisdiction of the Industrial Court. To proceed further when it is not a trade dispute or when the employee is not a workman is to act without jurisdiction. Of course, the Minister's act in making the reference is regular in the sense that he purports to act under the power given to him by the IRA, but it does not preclude the Industrial Court from examining whether it has jurisdiction to proceed or not. Such examination under no circumstances could be held to be a defiance against the ministerial order or a dereliction of duty for which a mandamus could be issued. This right to examine the preliminary issue of jurisdiction need not have to be expressly conferred in the statute nor does it depend upon a statutory provision empowering the Industrial Court to decline the hearing of a dispute, as insisted by Mohamed Azmi J. The right to examine its own jurisdiction is purely a matter of statute interpretation.
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> The truth of the matter is that the reference by the Minister does not clothe the Industrial Court with jurisdiction. It is only a procedure of bringing the dispute for adjudication before the Industrial Court, but it is still open to the Court to see whether it has jurisdiction or not to deal with the matter if the issue is raised. It would indeed be startling if the reference must be heard irrespective of lack of jurisdiction.
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> Thus, in my view, the error made by the Industrial Court to the effect that the respondent was a workman is an error which is not just an error on the face of record but an error which affects jurisdiction.

In *Hoh Kiang Ngan*, the Federal Court was of the view that observations made by the Supreme Court in Inchcape concerning the respondent's role as the brain or directing mind and will of the company must be read as being confined to the peculiar facts of that case and not as laying down any universal test. The Federal Court also took the opportunity to declare that the opinion expressed by Salleh Abbas LP, namely, that the relationship of master and servant is not the criterion in determining whether a claimant is a workman, does not truly represent the law upon the subject. In *Kathiravelu Ganesan v. Kojasa*

Holdings Sdn Bhd [1997] 3 CLJ 777, the Federal Court went further than that, *viz.*, *Inchcape* was overrulled. Gopal Sri Ram JCA, in delivering the judgment of the Federal Court, said:

> We now turn to the relatively easier task of dealing with the second authority relied upon by Mr Sivabalah. It is the rather controversial decision of the precursor of this court in *Inchcape*. That decision was reviewed at some length by this court in *Hoh Kiang Ngan*. No useful purpose will be served by a regurgitation of the criticism levelled against it. It is a decision that was plainly wrong, even upon its own facts. It also failed to properly appreciate the judgment of Mohd Azmi J and of the former Federal Court in *Assunta Hospital*. In our judgment, the time has come for this court to recognize that Inchcape was wrongly decided and is no longer good law. All that is required is to formally overrule it and that we can now do.

In *Dr A Dutt v. Assunta Hospital* [1981] 1 MLJ 304, Chang Min Tat FJ said the definition of workman in the Act is "wide enough to cover a doctor in a hospital, even a consultant". He said (at p. 310):

> As for the determination whether Dr Dutt was or was not a workman within the Act, we have, in an earlier decision *Assunta Hospital v. Dr A Dutt*, said that the question is a mixed question of fact and law and it is for the Industrial Court to determine this question. The fact is the ascertainment of the relevant conduct of the parties under their contract and the inference proper to be drawn therefrom as to the terms of the contract and the question of law, once the terms have been ascertained, is the classification of the contract for services or for service: see also *Australian Timber Workers Union v. Monaro Sawmills Pty Ltd*.

In *Hoh Kiang Ngan*, Gopal Sri Ram said (at p. 712):

> In our judgment, the correct test to be applied in determining whether a claimant is a workman under the Act is that enunciated by Chang Min Tat FJ in *Dr A Dutt v. Assunta Hospital* [1981] 1 MLJ 304 at p 311. We accordingly hold that a workman under the Act is one who is engaged under a contract of service. An independent contractor who is engaged under a contract for services is not a workman under the Act. We take this view because it provides, as earlier observed, for a flexible approach to the determination of the question. It is fairly plain to see why flexibility is achieved by having resort to this test.
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> In all cases where it becomes necessary to determine whether a contract is one of service or for services, the degree of control which an employer exercises over a claimant is an important factor, although it may not be the sole criterion. The terms of the contract between the parties must, therefore, first be ascertained. Where this is in writing, the task is to interpret its terms in order to determine the nature of the latter's duties and functions. Where

it is not then its terms must be established and construed. But in the vast majority of cases there are facts which go to show the nature, degree and extent of control. These include, but are not confined, to the conduct of the parties at all relevant times. Their determination is a question of fact. When all the features of the engagement have been identified, it becomes necessary to determine whether the contract falls into one category or the other, that is to say, whether it is a contract of service or a contract for services.

We approve the approach taken by Eusoff Chin J (now Chief Justice) in *Syarikat 3M Malaysia Sdn Bhd v. Nik Kamaruddin bin Ismail* [1990] 1 MLJ 365, where he said (at p 366):

> I am inclined to think that the Industrial Court was not concerned with nomenclature or position held by the claimant, but was concerned to get the truth of he claimant's duties and functions in the company. In this case in order to determine whether the claimant was or was not a workman, the Industrial Court had heard oral evidence, and perused documents submitted to it, and came to the conclusion that from the duties and functions performed by the claimant, he could not be said to be the mind and brain of the company. A figure-head director who merely signs document as directed by the company' board of directors certainly cannot be said to be a part of the mind and brain of the company.

The reference to the need to have the been the brain or controlling mind of a company is the passage cited was necessary by reason of the decision in *Inchcape* which constituted binding precedent. That aside, the importance of the passage cited lies in the approach suggested by the learned Chief Justice, namely, an examination of the functions of the claimant. This establishes what we regard as the true principle: that it is incorrect to state in absolute terms as was done by Seah SCJ in Inchcape that a company director can never be a workman.

In the instant case, we took note that when the Industrial Court concluded that the appellant was not a workman, it depended solely on the decision in *Inchcape* for support and it did not had the benefit of the decision of the Federal Court in *Hoh Kiang Ngan*. The learned judge had that benefit. He also said he was satisfied that the Industrial Court had actually applied the test in *Hoh Kiang Ngan.*

What is the test in *Hoh Kiang Ngan*? In *Hoh Kiang Ngan* Gopal Sri Ram JCA said the correct test to be applied in determining whether a claimant is a workman under the Act is that enunciated by Chang Ming Tat FJ in *Dr A Dutt v. Assunta Hospital, viz.*, that a workman under the Act is one who is engaged under a contract of service.

In the instant case, with due respect to the learned judge, we cannot find anywhere in the award where the Industrial Court had actually applied the test in *Hoh Kiang Ngan*. From our reading, the evidence before the Industrial Court, discussed earlier, showed the following:

(a) the appellant was first employed as the general manager of the respondent and was later appointed as executive director;

(b) he was entitled to a basic salary and his last drawn salary was RM5,000; he was also entitled to annual increments;

(c) as executive director, he had to report to and was responsible to the managing director of the respondent;

(d) the respondent's terms and conditions relating to termination of employment shall apply to him;

(e) in his evidence, the chairman and managing director of Metacorp Berhad, the holding company of the respondent confirmed that the appellant was an employee of the respondent;

(f) the resolutions of the board of directors dated 7 October 1989 and 28 March 1991 and also the extract of the minutes of the annual general meeting of the respondent held on 16 March 1991, which were discussed earlier, confirmed that he was an employee.

The appellant claimed that the respondent had to contribute the equivalent of 13% of his basic salary towards the Employment Provident Fund. This claim was not disputed. Section 2 of the Employees Provident Fund Act 1991 ("EPF Act") provides "wages" means, *inter alia*, all remuneration in money due to an employee under his contract of service and includes any bonus. Section 43(1) of the EPF Act provides every employee and every employer of a person who is an employee within the meaning of this Act shall be liable to pay monthly contributions on the amount of wages for the month. We cannot find any reason why the respondent would take it upon its goodself to make contributions towards the said fund on the appellant's wages if the appellant was not its employee.

The relationship of employer and employee exists where a worker is employed under a contract of employment, ie, a contract of service. According to *The Concise Oxford Dictionary* (9th edn), an "employee" is "a person employed for wages or salary". A person who is appointed director of a company does not become an employee of the company. Whether he is entitled to receive remuneration as a director would depend on the articles of association and that would normally have to be determined by the company in a general meeting.

An employee of a company can of course be appointed a director of that company. He remains an employee of the company as long as his contract of employment has not been terminated and would still be entitled to receive wages or salary. As director, he would further be entitled to any remuneration as determined by the company in general meeting if that is what is provided for and allowed by the articles of association of that company. Section 30(1) of the Companies Act 1965 provides that articles (of association) may adopt all or any of the regulations contained in Table A of the 4th Schedule to the Companies Act. Article 70 as contained in the said Table A reads:

> The remuneration of the directors shall from time to time be determined by the company in general meeting. That remuneration shall be deemed to accrue from day to day. The directors may also be paid all travelling, hotel, and other expenses properly incurred by them in attending and returning from meetings of the directors or any committee of the directors or general meetings of the company or in connection with the business of the company.

We did not have the benefit of sighting a copy of the articles of association of the respondent in relation to remuneration of directors and thus would not be in a position to say whether the respondent adopted such an article in its articles of association. Be that as it may, we noted that the minutes of the respondent's board of directors meeting held on 15 March 1993 showed that the board recommended varying amounts of director's fee be paid to the respondent's directors which included the appellant, subject to the approval of the shareholders at the forthcoming annual general meeting of the respondent. It was recommended that RM500 be paid to the appellant as director's fee for that financial year ended 31 December 1992. Directors' fees are not wages or salaries and generally shall be determined by the company in general meeting.

We are of the view that it is clear from the evidence available before the Chairman, Industrial Court, especially from the terms of the agreement which the appellant had with the respondent as illustrated in the respondent's board of directors' resolution dated 7 October 1989, that the appellant was a workman. He was an employee of the respondent and remained as such notwithstanding his appointment as director. The Industrial Court concluded that the appellant was the very brain and directing mind of the respondent and hence cannot be a workman within the contemplation of s. 2 of the Act based upon the following observations, namely, that as executive director he attended board of directors' meetings, signed resolutions, was made one of the signatories of the respondent's cheques and banking documents and had represented the respondent at public functions. We are of the view that the Industrial Court had made an erroneous finding. The contract of employment between the appellant and the respondent, as executive directors, is a contract of service.

Whilst carrying out his duties and functions as executive director, he still had to "report to and be responsible to the Managing Director". He was also required to carry out other duties and responsibilities "assigned by the Managing Director from time to time". He clearly fell within the contemplation of the meaning of "workman" under the Act. The Industrial Court had considered irrelevant facts in arriving at the conclusion that it did. For example, the resolution of the respondent's board of directors with regards to his appointment as executive director seems to suggest that his salary as executive director need not have the approval of the respondent in general meeting. His remuneration as director, *viz*., in the form of director's fees, would need the approval of the respondent in general meeting. In this respect, we would agree with the contention of the appellant's counsel that the appellant was wearing two hats, namely, one as director and one as employee and that he was terminated as an employee.

The other issue we need to deal with at this appeal relates to the preliminary objection by the respondent as to the threshold jurisdiction of the Industrial Court. We are of the view that the preliminary objection should not have been entertained. This issue was dealt with by the Federal Court in *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd* [1997] 3 CLJ 777 by Gopal Sri Ram JCA. He said:

> It follows that in all cases where a party to a trade dispute intends to question the threshold jurisdiction of the Industrial Court to make an adjudication, save upon the limited ground that the representations under section 20(1) were made out of time, he must do so by seeking to quash, by *certiorari*, the Minister's reference and, in the same proceedings, seek an order of prohibition against the Industrial Court from entertaining the dispute upon the ground that the latter has no jurisdiction to make an adjudication. Where a challenge is thus not taken, the Industrial Court must be permitted to decide the dispute to conclusion and in the process to deal with the jurisdictional question, eg, whether the particular claimant is or is not a workman or whether the matter involves the exercise of extra-territorial jurisdiction. On no account ought such matters to be taken or dealt with as preliminary objections. Any other course would, as we have earlier observed, obstruct a speedy disposal of a trade dispute and thereby cut across the spirit and intendment of the Act.

We are aware that the Industrial Court and the learned judge did not have the benefit of the above authority when they made their respective decisions. But then, a similar issue, although under a different section of the Act, was dealt with earlier in *Attorney-General, Malaysia v. Chemical Workers' Union of Malaya & Anor* [1971] 1 MLJ 38, *viz.*, can the Industrial Court refuse to make a decision once a representation is referred to it by the Minster? In that case,

Abdul Aziz J held that once a case is referred to it, the Industrial Court is seised with power to hear the dispute and make its award relating to all or any of the issues is dispute.

A similar issue, under a different section of the Act, was also dealt with by Suffian FJ (as he then was) in *Kesatuan Pekerja-Pekerja Kenderaan Sri Jaya v. The Industrial Court & Ors* [1970] 1 MLJ 78.

In *Kathiravelu Ganesan*, the Federal Court was of the veiw that the threshold jurisdiction of the Industrial Court cannot be challenged without joining the Minister and seeking relief against him. Gopal Sri Ram JCA said:

> We are of the view that, having regard to the general scheme of the Act, Parliament did not intend a threshold jurisdiction challenge before the Industrial Court by way of preliminary objection, for the legislature's paramount concern in passing the Act was to ensure speedy disposal of industrial disputes. And permitting preliminary objections to the threshold jurisdiction being taken will only delay industrial adjudication.

We are aware that applications for prerogative orders are not appeals and neither the High Court nor this court is entitled to review the merits of any decision reached by the Industrial Court. We are also aware that it is well settled that *certiorari* is given only in cases where an error of law is disclosed. But in the instant case, we are of the view that the learned judge, with greatest respect, did not seem to have directed his mind to the circumstances in which the decision was reached by the Industrial Court but only to the merits of the decision reached. A question whether a person is a workman is one of mixed law and fact for the Industrial Court to decide. In Chief Constable of the *North Wales Police v. Evans* [1982] 3 All ER 141; [1982] 1 WLR 1155 at p. 1173 which was referred to by Gopal Sri Ram, JCA in *Hoh Kiang Ngan*, Lord Brightman said:

> Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.

In the instant case, we find that the learned judge did not exercise his discretion judiciously when he refused the appellant's application for an order of *certiorari* to quash the award and for an order of mandamus directing the Industrial Court to hear the appellant's dismissal case on the merits. In *Hoh Kiang Ngan*, Gopal Sri Ram JCA said:

The true principle governing the grant of prerogative relief appears in the following passage in the judgment of Bose J in *Sangram Singh v. Election Tribunal* AIR [1955] SC 425 at p. 429:

> That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as courts of appeal under Art 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognized lines and not arbitrarily; and *one of the limitations imposed by the courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensue. They will not allow themselves to be turned into courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense,* for, though no legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these special rights decided as speedily as may be. Therefore writ petitions should not be lightly entertained in this class of case. (emphasis added).

We are of the view that substantial injustice has ensued in this case. We thus allowed the appeal, set aside the order of the learned judge and issue certiorari to quash the award of the Industrial Court and issue mandamus directing the Industrial Court to hear the appellant's dismissal case on the merits. We also awarded costs to the appellant here and below and directed that the deposit lodged in court by way of security be paid out to the appellant.